Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02 (IM)(NCVC)-926–05 OF 2017
IDRUS HARUN, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
5 DECEMBER 2017

Constitutional Law — Government — Prime Minister — Whether Prime Minister of Malaysia a 'public officer' who could be sued for 'misfeasance in public office' and 'breach of fiduciaries in public office' — Whether mere fact Prime Minister occupied public office did not mean he was 'public officer' — Whether s 3 of the Interpretation Acts 1948 and 1967 read together with arts 132(1), 132(3) and 160(2) of the Federal Constitution showed that Prime Minister was 'member of the administration' appointed by King whereas 'public officer' was one who held and exercised functions of office in any of 'public services' and was appointed by Public Services Commission — Whether 'public services' excluded office of any 'member of the administration' — Whether meaning given to phrase 'public officer' by Interpretation Acts and Federal Constitution must be preferred over the common popular meaning given to it under English common law — Whether suit against Prime Minister plainly unsustainable and had to be struck out under O 18 r 19 of the Rules of Court 2012

English Law — Tort — Misfeasance in public office — Whether English common law failed to precisely define who a 'public officer' for purposes of tort of misfeasance in public office — Whether no authority existed to state whether or not the Prime Minister of England was a public officer — Whether Malaysian law had to be resorted to decide whether the Prime Minister of Malaysia was a 'public officer' — Whether Malaysian Interpretation Acts 1948 and 1967 read together with arts 132(1), (3) and 160(2) of the Federal Constitution showed that the Prime Minister of Malaysia was not a 'public officer' but only a 'member of the administration' — Whether 'public officer' was one who held office in any of the 'public services' which term excluded the office of any 'member of the administration' — Whether proviso to s 3(1) of the Civil Law Act 1956 could not be used to assign popular dictionary meaning of 'public officer' under English common law to Prime Minister of Malaysia

Tort — Misfeasance in public office — Breach of fiduciaries in public office — Whether appellants failed to prove primary ingredient common to both torts that Prime Minister of Malaysia was 'public officer' — Whether appellants failed to show existence of fiduciary relationship based on mutual trust and confidence

between themselves and Prime Minister of Malaysia — Whether appellants' pleadings failed to particularise facts on which two torts were based and did not show how they suffered damages because of respondent's acts or omissions

The appellants sued the respondent for the torts of 'misfeasance in public office' and 'breach of fiduciaries in public office' allegedly committed by him when he was Prime Minister and Finance Minister of Malaysia as well as President of the United Malays National Organisation ('UMNO') and chairman of the country's ruling coalition, the Barisan Nasional ('BN'). Among the torts that were alleged against the respondent were that he had removed the country's Deputy Prime Minister, the attorney general and a cabinet minister from office and carried out acts that undermined, subverted and compromised the work of various government institutions, including enforcement agencies, investigating his alleged involvement in a financial scandal. The High Court allowed the respondent's application to strike out the appellants' suit under O 18 r 19 of the Rules of Court 2012 on the ground that since the respondents were unable to show that the respondent was a 'public officer' — a primary and crucial ingredient of the two torts — the suit was doomed to fail from the start. The main issue in the instant appeal was whether the High Court was right to hold that the respondent was not a 'public officer'. The appellants relied upon English common law to support their causes of action.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The Prime Minister of Malaysia was not a public officer and a public officer was not the Prime Minister. The Prime Minister was a 'member of the administration' whereas a public officer was a member of the 'public services' as set out under art 132(1) read with art 132(3) of the Federal Constitution (see paras 41 & 44).

(2) By virtue of s 3 of the Interpretation Acts 1948 and 1967, read harmoniously with arts 132(1), 132(3) and 160(2) of the Federal Constitution, 'public officer' and 'Prime Minister' were two different entities. They were intended by Parliament to be different. In fact, art 132(3) of the Federal Constitution expressly provided that the 'public service' shall not be taken to comprise the office of any 'member of the administration', to which the respondent belonged. Further, s 66 of the Interpretation Acts provided that 'Prime Minister' or 'Perdana Menteri' meant the person appointed as Prime Minister by the Yang di-Pertuan Agong under art 43 of the Federal Constitution. Contrast this with a 'public officer' whose appointment was not by the Yang di-Pertuan Agong but by the Public Services Commission (see paras 43–44).

(3) Since the Interpretation Acts assigned only one meaning to the words 'public office' and that was 'an office in any of the public services', it

would be stretching the imagination to suggest that the Prime Minister of Malaysia was a federal officer in the general public service of the Federation. One should not fall into the trap of thinking that just because the respondent held public office he was, by default, a 'public officer'. For him to be a 'public officer', he had to hold office in any of the 'public services', which he did not. Since 'public officer' had been given a special meaning by the Interpretation Acts, it should not be given its popular, dictionary or common law meaning assigned to it by a foreign court in a foreign jurisdiction no matter how persuasive or how compatible with common sense the common law meaning was. The statutory meaning that was given by the Legislature to the words 'public officer' had to be applied, and no others, in determining whether the Prime Minister of Malaysia was a 'public officer' for the purposes of the tort of misfeasance in public office. The common law meaning of 'public officer' as propounded by the House of Lords in *Three Rivers District Council and others v Bank of England (No 3)* [2000] 3 All ER 1 had, as a matter of law, to give way to the statutory meaning given to those words by s 3 of the Interpretation Acts which was a provision that 'has been made or may hereafter be made by any written law' within the meaning of s 3(1) of the Civil Law Act 1956. No facet of the common law of England could override our written law (see paras 48–50 & 53–55).

(4) It was tempting to argue that since s 2 of the Government Proceedings Act 1956 ('GPA') defined 'officer' in relation to a government to include 'a Minister of such government' (and 'Minister' under s 3 of the Interpretation Acts included the Prime Minister), the Prime Minister being a Minister of the Federal Government must therefore be treated as a 'public officer' for the purposes of the tort of misfeasance in public office. Such a definition would only come into play if the government was a party to the proceedings, which was not the case in the instant appeal. Even if the government had been made a party, the action would still not have taken off the ground for the simple reason such proceedings would not have lain against the respondent personally thus taking it outside the ambit of s 5 of the GPA (see paras 60–61 & 64–65).

(5) By its nature, the so called tort of 'breach of fiduciaries in public office' required proof that the respondent was a 'public officer', the same ingredient that was required to prove the tort of misfeasance in public office. In any case, a fiduciary relationship only existed when there was mutual trust and confidence between two parties. The court could not see how this element of mutual trust and confidence existed between the respondent as Prime Minister and the appellants as private citizens (see paras 74 & 85).

(6) It was difficult to comprehend how the facts relied on by the appellants could constitute 'breach of fiduciaries in public office'. It was not pleaded

by any of the appellants that they had suffered damage as a result of the exercise of power by the respondent. A defect common to all the appellants in their pleadings was the absence of pleaded particulars of the specific acts taken by the respondent, the dates of such acts or omissions or the nature of the alleged instructions issued by the respondent, and to whom. There was absolutely no plea on these ingredients of the said tort. Accordingly, the pleadings as they stood could not possibly get off the ground. The tort of 'breach of fiduciaries in public office' like the tort of 'misfeasance in public office' was doomed to fail. A trial would not have rectified or remedied the defect (see paras 89 & 95–96).

(7) With regard to the contention that the respondent was a 'public officer' not only by virtue of being Prime Minister and Finance Minister but also by virtue of being President of UMNO and chairman of the BN, it must be appreciated that both those bodies were not public or government bodies but political parties registered under the Societies Act 1966 (see paras 46–47).

[Bahasa Malaysia summary

Perayu-perayu telah menyaman responden kerana tort 'misfeasans dalam jawatan awam dan pelanggaran fidusiari dalam jawatan awam' yang dikatakan telah dilakukan olehnya semasa beliau Perdana Meneri dan Menteri Kewangan Malaysia dan juga Presiden Pertubuhan Kebangsaan Melayu Bersatu ('UMNO') dan pengerusi parti pemerintah negara, Barisan Nasional ('BN'). Antara tort yang dikatakan terhadap responden adalah bahawa beliau telah menyingkir Timbalan Perdana Menteri Negara, peguam negara dan menteri kabinet daripada jawatan dan melakukan perbuatan yang melemahkan, mengganggu dan menjejaskan kerja pelbagai institusi kerajaan, termasuk agensi-agensi penguatkuasaan, menyiasat penglibatannya yang dikatakan dalam skandal kewangan. Mahkamah Tinggi membenarkan permohonan responden untuk membatalkan guaman perayu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 212 atas alasan oleh kerana responden-responden tidak dapat menunjukkan bahawa responden adalah 'penjawat awam' — elemen yang utama dan penting untuk dua tort itu — guaman itu akan gagal dari mula lagi. Isu utama dalam rayuan ini adalah sama ada Mahkamah Tinggi betul dalam memutuskan bahawa responden bukan seorang 'penjawat awam'. Perayu-perayu bergantung kepada *common law* Inggeris untuk menyokong kausa tindakan mereka.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Perdana Menteri Malaysia bukan penjawat awam dan penjawat awam bukan Perdana Menteri. Perdana Menteri adalah 'ahli pentabiran' manakala penjawat awam adalah ahli 'perkhidmatan awam sebagaimana dinyatakan di bawah perkara 132(1) dibaca dengan perkara 132(3)

Perlembagaa Persekutuan (lihat perenggan 44 & 41).

(2) Menurut s 3 Akta Tafsiran 1948 dan 1967, dibaca bersama perkara 132(1), 132(3) dan 160(2) Perlembagaan Persekutuan, 'penjawat awam' dan 'Perdana Menteri' adalah dua entiti berbeza. Mereka diniatkan oleh Parlimen untuk berbeza. Bahkan, perkara 132(3) Perlembagaan Persekutuan dengan jelas memperuntukkan bahawa 'perkhismatan awam' tidak boleh dianggap sebagai merangkumi jawatan mana-mana 'ahli pentadbiran', yang mana adalah terdiri oleh responden. Selanjutnya, s 66 Akta Tafsiran memperuntukkan bahawa 'Perdana Menteri' atau 'Prime Minister bermaksud orang yang dilantik sebagai Perdana Menteri oleh Yang di-Pertuan Agong di bawah perkara 43 Perlembagaaan Persekutuan. Bandingkan ini dengan 'penjawat awam' yang mana pelantikannya bukan oleh Yang di-Pertuan Agong tetapi oleh Pesuruhjaya Perkhidmatan Awam (lihat perenggan 43–44).

(3) Oleh kerana Akta Tafsiran hanya memberikan satu maksud kepada perkataan-perkataan 'jawatan awam' dan ia adalah 'suatu jawatan dalam mana-mana perkhidmatan awam', ia tidak wajar untuk mencadangkan bahawa Perdana Menteri Malaysia adalah penjawat persekutuan dalam perkhidmatan awam Persekutuan. Sesiapapun tidak patut memikirkan bahawa hanya kerana responden memegang jawatan awam maka dia adalah, secara automatik, seorang 'penjawat awam'. Jika beliau seorang 'penjawat awam', beliau perlu memegang jawatan dalam mana-mana 'perkhidmatan awam', yang mana beliau tidak begitu. Oleh kerana 'penjawat awam' telah diberikan maksud khas oleh Akta Tafsiran, ia tidak patut diberikan maksud popular, kamus atau undang-undang biasa yang diberikan kepadanya oleh mahkamah asing dalam bidang kuasa asin tidak kira bagaimana meyakinkan atau bagaimana serasi dengan akal maksud undang-undang biasa diberikan. Maksud statutori yang diberikan oleh badan perundangan kepada perkataan-perkataan 'penjawat awam' perlu terpakai, dan tiada lain, dalam menentukan sama ada Perdana Menteri Malaysia adalah 'penjawat awam' bagi tujuan tort misfeasans dalam jawatan awam. Maksud 'penjawat awam' dalam undang-undang biasa sebagaimana dinyatakan oleh House of Lords dalam kes *Three Rivers District Council and others v Bank of England (No 3)* [2003] 3 All ER 1, dari segi undang-undang, terpaksa memberi jalan kepada maksud statutori yang diberikan kepada perkataan-perkataan tersebut oleh s 3 Akta Tafsiran yang merupakan peruntukan yang 'has been made or may hereafter be made by any written law' dalam maksud s 3(1) Akta Undang-Undang Sivil 1956. Tiada aspek *common law* Inggeris yang boleh mengatasi undang-undang Malaysia (lihat perenggan 48–50 & 53–55).

(4) Ia boleh dihujahkan bahawa oleh kerana s 2 Akta Prosiding Kerajaan 1956 ('APK') bererti 'penjawat' berkaitan kerajaan yang termasuk

'Kementerian suatu Kerajaan' (dan 'Menteri' di bawah s 3 Akta Tafsiran termasuk Perdana Menteri), Perdana Menteri sebagai Menteri Kerajaan Persekutuan perlu dengan itu dianggap sebagai 'penjawat awam' bagi tujuan tortmisfeasans dalam jawatan awam. Definisi sedemikian hanya berfungsi jika kerajaan adalah pihak kepada prosiding, yang tidak berlaku dalam rayuan ini. Jikapun kerajaan telah dijadikan pihak, tindakan mash tidak boleh dimulakan oleh sebab prosiding sebegini adalah terhadap responden secara peribadi dan oleh itu di luar skop s 5 APK (lihat perenggan 60–61 & 64–65).

(5) Berdasarkan sifatnya, tort 'pelanggaran fidusiari dalam jawatan awam' memerlukan bukti bahawa responden adalah 'penjawat awam', elemen sama yang diperlukan untuk membuktikan tort misfeasans dalam jawatan awam. Dalam apa keadaan, hubungan fidusiari hanya wujud apabila terdapat kepercayaan dan keyakinan bersama antara dua pihak. Mahkamah tidak dapat melihat bagaimana elemen kepercayaan dan keyakinan bersama ini wujud antara responden sebagai Perdana Menteri dan perayu-perayu sebagai warganegara persendirian (lihat perenggan 74 & 85).

(6) Ia adalah sukar untuk difahami bagaimana fakta yang perayu-perayu bergantung kepada merupakan 'pelanggaran fidusiari dalam jawatan awam'. Ia tidak dipli oleh mana-mana perayu bahawa mereka telah mengalami kerugian akibat pelaksanaan kuasa oleh responden. Kecacatan biasa kepada semua perayu-perayu dalam pliding mereka adalah ketiadaan butiran yang dipli berhubung tindakan spesifik yang diambil oleh responden, tarikh-tarikh tindakan atau peninggalan tersebut atau sifat arahan yang dikatakan telah dikeluarkan oleh responden, dan kepada siapa. Sememangnya tiada pli berhubung elemen sedemikian berhubung tort tersebut. Oleh itu, pliding tersebut tidak boleh diteruskan. Tort 'pelanggaran fidusiari dalam jawatan awam' sepertimana tort 'misfeasans dalam jawatan awam' akan gagal. Perbicaraan tidak boleh memperbetulkan atau meremedikan kecacatan itu (lihat perenggan 89 & 95–96).

(7) Berhubung hujah bahawa responden adalah 'pejawat awam' bukan sahaja kerana menjadi Perdana Menteri dan Menteri Kewangan tetapi juga kerana menjadi presiden UMNO dan pengerusi BN, ia perlu dihayati bahawa kedua-dua badan tersebut bukan badan awam atau kerajaan tetapi parti politik yang berdaftar di bawah Akta Persatuan (lihat perenggan 46–47).]

Notes

For cases on government in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2904–2905.

For cases on misfeasance in public office in general, see 12(1) *Mallal's Digest*

(5th Ed, 2017 Reissue) paras 1079–1083.
For cases on tort in general, see 6(3) *Mallal's Digest* (5th Ed, 2015) paras 2737–2743.

Cases referred to

Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal [2012] 4 MLJ 72; [2013] 2 CLJ 734, CA (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Brennan v Comcare [1994] 122 ALR 615, HC (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356; [1990] 1 CLJ 675; [1990] 1 CLJ Rep 57, SC (refd)
Common Cause v Union of India [1999] (6) SCC 667, SC (refd)
Florencio Marin and Jose Coye v The Attorney General of Belize [2011] CCJ 9 (AJ) (refd)
Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281; [2017] 4 CLJ 676, FC (refd)
Kim Hok Yung and others v Cooperative Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party) [2000] 2 SLR(R) 455, HC (refd)
LBCN Development Sdn Bhd & Anor v Pengarah Tanah dan Galian Selangor & Ors [2014] 3 MLJ 445; [2014] 3 CLJ 970, CA (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Mohd Khir bin Toyo v Public Prosecutor [2015] 5 MLJ 429; [2015] 8 CLJ 769, FC (refd)
Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Mohd Nor [2016] 4 MLJ 282; [2016] 6 CLJ 346, FC (refd)
Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors [2016] 10 MLJ 517; [2015] 8 CLJ 555, HC (refd)
Richard Hugh Frame v Eleanor Margaret Smith and Johnson Smith [1987] 2 SCR 99, SC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat; Amitabha Guha (sebagai wasi bagi harta pusaka Madhabendra Mohan Guha) & Anor v Pentadbir Tanah Daerah Hulu Langat [2017] MLJU 535, FC (refd)
Smith and others v Inner London Education Authority [1978] 1 All ER 411, CA (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] 3 AMR 35, CA (refd)
Three Rivers District Council and others v Bank of England (No 3) [2000] 3 All ER 1, HL (folld)
Vacher & Sons Ltd v London Society of Compositors [1913] AC 107, HL (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (folld)

Legislation referred to

Civil Law Act 1956 s 3(1)
Federal Constitution arts 43, 132(1), (1)(c), (3), 160(2)
Government Proceedings Act 1956 ss 2, 5, 6(1)
Interpretation Acts 1948 and 1967 ss 3, 66
Penal Code s 21
Perbadanan Kemajuan Negeri Selangor Enactment 1964
Rules of Court 2012 O 18 r 19
Societies Act 1966

Appeal from: Civil Suit No WA22NCVC-181–03 of 2016 (High Court, Kuala Lumpur)

Haniff Khatri (Ilyani Noor Khuszairy with him) (Haniff Khatri) for the appellants.
Cecil Abraham (Rishwant Singh, Mohd Hafarizam Harun and Norhazira Abu Haiyan with him) (Hafarizam Wan & Aisha Mubarak) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] In the High Court at Kuala Lumpur, the appellants sued the respondent, Datuk Seri Mohd Najib bin Tun Hj Abdul Razak for the tort of misfeasance in public office and for 'breach of fiduciaries in public office'. The tort of misfeasance in public office was alleged to have been committed by the respondent in his capacities as the Prime Minister of Malaysia, Minister of Finance, President of the United Malays National Organisation (UMNO) and Chairman of the Barisan Nasional (BN).

[2] It was alleged that in those capacities the respondent was in a position to control, command, instruct, require, to insist on any act, conduct, omissions, within the power of each and every machinery, including but not limited to the various government ministries and parliamentary offices or legal enforcement agencies or any other public figure or civil servant 'to do certain things'.

[3] The appellants' case was that the respondent had carried out acts to undermine, subvert and compromise the various institutions involved in the probe into 1Malaysia Development Bhd ('1MDB') and other related companies and the alleged remittance of approximately RM2.6 billion and RM42m 'or any other amount' into the respondent's personal bank accounts.

[4] Among the tortious acts allegedly committed by the respondent were the removals of Tan Sri Muhyiddin Hj Mohd Yassin from his post as Deputy Prime Minister, Dato' Seri Hj Mohd Shafie bin Hj Apdal from his post as Minister of

Rural and Regional Development and Tan Sri Abdul Gani Patail from his post as attorney general.

[5] The respondent applied to strike out the suit pursuant to O 18 r 19 of the Rules of Court 2012 ('the Rules') on the ground that it was plainly and obviously unsustainable. The application was allowed by the learned judge, hence the present appeal before us, which we dismissed by a unanimous decision on the ground that the learned judge did not exercise his discretion wrongly in striking out the appellants' claims. These are the grounds of our decision.

[6] At the outset of the hearing, learned counsel for the appellants indicated to us that he was pursuing only one issue in relation to the tort of misfeasance in public office, and that is whether the learned High Court judge was right in holding that the respondent is not a 'public officer'.

[7] In considering whether to allow or to dismiss the appellants' appeal, we took guidance from the Federal Court decision in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 where Abdoolcader J (as he then was) delivering the judgment of the court said at p 151:

> (b) Review of discretion by an appellate court
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> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* [1942] AC 130 (at p 148) per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473. The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett v James* [1978] AC 297 (at pp 317 and 326). For good measure, we would refer to the felicitous expression of Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22 on this point (at p 25):
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> > ... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to

A the conclusion which in fact was arrived at.

[8] The primary question for the learned judge's determination in the present case was solely a question of law where the facts were clear and undisputed. The approach to be taken by the court in dealing with such application has been explained by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400. It was a decision in the context of a summary judgment application involving a complex point of law. At p 408 the Supreme Court laid down the following dicta:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey and European Asian Bank AG v Punjab & Sind Bank* at p 516).

[9] Having heard arguments by both sides, both written and oral, we took the view that the appellants' claims, based as they were on the tort of misfeasance in public office and 'breach of fiduciaries in public office', were doomed to fail. It was clear to us that the appellants' claims could not pass muster and the learned judge was right in striking them out.

[10] Speaking of hopeless claims, reference may be made to the Singapore High Court case of *Kim Hok Yung and others v Cooperative Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party)* [2000] 2 SLR(R) 455 where Choo Han Teck JC said at p 462:

> The general principle is that however weak a plaintiff's case may appear, he is entitled to his day in court. He pays for any misplaced confidence in his case by the award of costs. Thus, generally, the courts may permit seemingly weak cases to proceed to trial so that a plaintiff is not unfairly treated by being shut out before he has presented his evidence. But by the same token, it is also unfair to compel a defendant to expend not only money but time and effort in defending an obviously unmeritorious case. Thus, before a court strikes out a claim on the ground that it is frivolous or vexatious it must satisfy itself that the claim is obviously unsustainable, or that it amounts to an abuse of the process of court; of the latter, it has long been recognised that hopeless litigation or claims that are 'doomed to fail' fall into the category.

[11] For the principle of law to be applied in an action founded on the tort of misfeasance in public office, learned counsel for the appellants referred us to the majority decision of the Carribean Court of Justice in *Florencio Marin and Jose Coye v The Attorney General of Belize* [2011] CCJ 9 (AJ) where Justice Desiree Bernard in her judgment at paras 47–48 and 54 summarised the

history and nature of the tort as follows:

> [47] The tort of misfeasance came into being as an action on the case and developed into a tort with its own special characteristics. It has a long history dating back to the 17th century or even earlier, but attracted attention in the case of *Ashby v White* which involves the prohibition by an elections officer of an individual's right to vote, and has since been utilised almost exclusively by individuals seeking redress for infringement of a variety of rights by public officials misusing and abusing powers vested in them for improper reasons. The main ingredient of the tort being proof of malice by the public officer and the difficulties in proving such malice may have resulted in the tort lying dormant for several years. Lord Diplock, however, in *Dunlop Woollahra Municipal Council* described the tort of misfeasance as being well established, a view which was later endorsed by Brennan J in the Australian case of *Northern Territory of Australia v Mengel*.
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> [48] The first case to define comprehensively the ingredients of the tort was *Three Rivers District Council and Others v Governor and Company of the Bank of England* which became the *locus classicus* wherever it was sought to utilize the tort. Lord Steyn in delivering the opinion of the House of Lords traced the history of the tort, and concluded that its rationale was that in a legal system based on the rule of law, executive or administrative power may be exercised only for the public good and not for ulterior and improper purposes. Similar sentiments were expressed earlier by Nourse LJ in *Jones v Swansea City Council* who emphasized that whatever the nature or origin of the power, it is the office on which everything depends.
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> [54] All of the cases on the tort of misfeasance brought in the jurisdictions where it has been utilized have been at the instance of individuals, defining over the years the essential nature of the tort. It was never conceived as being available to or created for any entity or group. *Bourgoin*, however, decided in 1985, stands out as an exception to this traditional development with the plaintiffs being companies as mentioned earlier. This may have been the first departure from the sole individual claiming under the tort. Significantly it does not seem to have attracted comment on whether the tort of misfeasance was available to the plaintiffs in that case. What seems to be of paramount importance is the abuse of power by the public official against someone or an entity with a sufficient interest to claim compensation for loss suffered by that abuse of power. This was made pellucidly clear by both Lord Steyn and Clarke J in their judgments.

[12] In his supporting judgment in the same case, Justice W Anderson said at paras 124–125:

> [124] ... Although misfeasance in public office is traceable to the 17th century the tort appears to have been placed on a solid footing in the classic case of *Ashby v White* which established that an action would lie by an elector who had been willfully denied a right to vote by a returning officer.
>
> [125] During the intervening 300 hundred years the tort, though intermittent in its visibility, has been used to provide recourse and relief to citizens damnified by the misuse of power by a public official.

[13] The case concerns the competence of the Belize Attorney General to bring an action in the tort of misfeasance in public office on behalf of the crown against two former government ministers in order to recover compensation for the loss sustained as a consequence of their alleged misfeasance in public office.

[14] Justice Michael de la Bastide and Justice Adrian Saunders however did not agree with the majority that the attorney general could do so against the two former ministers. This is what they said in their joint dissenting judgment at para 10:

> [10] It is sufficient to note that the overwhelming consensus throughout the entire commonwealth, as we shall shortly see, is that the tort protects the peculiar interests of a private entity or a member of a class. The notion that the House of Lords in *Three Rivers*, by a side wind, radically altered the common law so as to confer on the State the right of action for misfeasance is a startling one.

[15] Then in their concluding remarks at para 44:

> [44] Public wrongs should normally attract public sanctions. Corrupt acts ought to be dealt with by punishing the perpetrator. When allegations are made that a minister has misbehaved in office and the misbehavior occasions significant and foreseen economic loss to the State and corresponding personal gain to the minister and/or his company, it is in the public interest that criminal proceedings be instituted. The failure to detect, investigate, prosecute and punish corruption has a corrosive impact on democracy and the rule of law. We underestimate at our peril the degree to which such failure affords encouragement to the criminal element in society and contributes to burgeoning crime rates. Extending the tort of misfeasance unnecessarily to give the attorney general another choice of civil remedies does not strike a blow for the maintenance of probity by public officials. Quite the contrary, it has the opposite effect. It offers the miscreant the softer option of civil liability. In countries where the attorney general is an active politician it may even open the door to actions inspired by the hope of political gain. In the result, it is our view that this extension will serve to erode rather than promote integrity in public life. Neither the interest of the State of Belize nor the state of Carribean jurisprudence is enhanced by it. We would have allowed this appeal.

[16] Common law refers to rules of law developed by judges as opposed to those created by statute. Section 3 of our Interpretation Acts 1948 and 1967 ('the Interpretation Acts') defines 'common law' to mean the common law of England. But it must not be assumed that every sphere of the common law of England is applicable in this country. Its applicability is governed by s 3(1) of the Civil Law Act 1956 ('the Civil Law Act'), which provides as follows:

> 3 Application of UK common law, rules of equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[17] What this provision means in its application to Peninsular Malaysia is that the common law of England as administered on 7 April 1956 is only to be applied where there is no written law in force in Malaysia after the coming into force of the Civil Law Act on 7 April 1956. In dealing with this provision in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356; [1990] 1 CLJ 675; [1990] 1 CLJ Rep 57, Hashim Yeop Sani CJ (Malaya) delivering the judgment of the Supreme Court said at p 66:

> Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England.

[18] There can be no question that the House of Lords decision in *Three Rivers District Council and others v Bank of England (No 3)* [2000] 3 All ER 1 which Justice Desiree Bernard referred to in the *Belize* case represents the common law of England on the tort of misfeasance in public office. It is not the common law of Malaysia and as such cannot just be accepted as our law lock stock and barrel without regard to our written law.

[19] Even if we were to adopt the common law doctrine as our own common law, it must first satisfy the conditions laid down in the proviso to s 3(1) of the Civil Law Act 1956, which we reproduce below for ease of reference:

> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[20] In the *Belize* case, Justice Desiree Bernard pointed out that *Three Rivers*

A was the first case that laid down the ingredients of the tort of misfeasance in public office. Her Ladyship was echoing what Lord Steyn said in delivering the opinion of the House of Lords at p 7, as follows:

> The present case is the first occasion on which the House has been called on to review the requirements of the tort in a comprehensive manner. Your Lordships are however not asked to prepare an essay on the tort of misfeasance in public office but to state the ingredients of the tort as far as it may be material to the concrete disposal of the issues arising on the pleadings in this case.

[21] It was at p 8 of the law report that the House of Lords laid down the ingredients of the tort, in the following terms:

> It is now possible to consider the ingredients of the tort. That can conveniently be done by stating the requirements of the tort in a logical sequence of numbered paragraphs.
>
> (1) The defendant must be a public officer
>
> It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private law functions as a landlord is potentially capable of being sued (see *Jone's* case). In the present case it is common ground that the Bank satisfies this requirement.
>
> (2) The second requirement is the exercise of power as a public officer
>
> This ingredient is also not in issue. The conduct of the named senior officials of the banking supervision department of the bank was in the exercise of public functions. Moreover, it is not disputed that the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention (see *Racz v Home Office* [1994] 1 All ER 97; [1994] 2 AC 45).
>
> (3) The third requirement concerns the state of mind of the defendant
>
> The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.

[22] So the first ingredient of the common law tort of misfeasance in public office is that the defendant must be a 'public officer'. This ingredient of the tort must first be established, failing which the tort will not have been made out even if the second and third ingredients are proved to the hilt.

[23] Given the importance of the ingredient and given the fact that there is

no written law in England (not that we know of) to define what 'public officer' means, it is unfortunate that the House of Lords did not explain the precise terms and scope of the words 'public officer' other than to say that 'It is the office in a relatively wide sense on which everything depends'.

[24] With all due respect, this hardly gives meaning, let alone a precise meaning to the phrase 'public officer' unless of course what the House of Lords had in mind was its popular or dictionary meaning. Whatever it was that it had in mind, what is clear is that the House of Lords did not decide, nor was it called upon to decide, the question whether the Prime Minister of England is a public officer. This sets the case poles apart from the case before us where the issue for determination was whether the Prime Minister of Malaysia is a public officer.

[25] Since the respondent in the present appeal was sued in his capacity as Prime Minister of Malaysia, the question to ask in the context of the tort of misfeasance in public office is whether he is a 'public officer' under Malaysian law. This in turn depends on the question whether the term 'public officer' is to be determined by reference to the common law of England or by reference to the written law of Malaysia.

[26] We were referred to the decision of this court in *LBCN Development Sdn Bhd & Anor v Pengarah Tanah dan Galian Selangor & Ors* [2014] 3 MLJ 445; [2014] 3 CLJ 970 where the following observations by Lord Hutton in *Three Rivers*, which the Indian Supreme Court of India in *Common Cause v Union of India* [1999] (6) SCC 667 referred to, were cited with approval:

> (1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to the public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in *Northern Territory v Mengel* [1995] 69 ALJR 527, it has some similarities to them. (2) Malice, in the sense of an intention to injure the plaintiff or a person is a class of which the plaintiff is a member, and knowledge by the officer both that he has no power to do the act complained of and that the act will probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, nor cumulative, ingredients of the tort. To act with such knowledge is to act in a sufficient sense maliciously: see *Mengel* (1995) 185 CLR 307 at 370) per Deane J. (3) For the purposes of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the officer has actual knowledge that the act was unlawful or, in circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to take such steps as would be taken by an honest and reasonable man to ascertain the true position. (4) For the purposes of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member it is sufficient if the officer has official knowledge that his act will probably damage the plaintiff or such a person or, in circumstances

A in which he believes or suspects that his act will probably damage the plaintiff or such a person, if he does not ascertain whether that is so or not or if he fails to make such inquiries as an honest and reasonable man would make as to the probability of such damage. (5) If the states of mind in (3) and (4) do not amount to actual knowledge, they amount to recklessness which is sufficient to support liability B under the second limb of the tort. (6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has C suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act.

D **[27]** According to counsel, this court in *LBCN* applied the common law definitions of 'public office' and 'public officer' in determining the cause of action in the tort of misfeasance in public office to the facts of the case. What we found readily distinguishable with regard to the case is that it involved a government officer as the alleged tortfeasor and not the Prime Minister as in E the present case. The case is therefore irrelevant as the primary facts are materially different.

[28] We were also referred to the Federal Court case of *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429; [2015] 8 CLJ 769 where it was held F that the appellant was a 'public servant' in his capacities as Menteri Besar of Selangor and Chairman of Perbadanan Kemajuan Negeri Selangor (PKNS). Likewise, we do not see the relevance of case to the issue before us. It was a criminal case and the court was not called upon to consider the question whether the appellant in his capacity as Menteri Besar of Selangor could be G liable in the tort of misfeasance in public office, which is a civil cause of action.

[29] The court in that case was more concerned with the question whether the appellant as Chairman of Perbadanan Kemajuan Negeri Selangor (PKNS) was a 'public servant' within the meaning of s 21 of the Penal Code and the H relevant provisions of the Perbadanan Kemajuan Negeri Selangor Enactment 1964. Jeffrey Tan FCJ delivering the unanimous decision of the court answered the question in the affirmative. This is what His Lordship said at p 795:

I It must be proved that the appellant was a public servant at the material time. The trial court held that the appellant was a public servant, but failed to give any reason for its finding, except for the fact that the appellant was the Menteri Besar of Selangor. The particulars of the charge read that the appellant, as Menteri Besar, was a public servant. Nonetheless, the case of the prosecution was that the appellant, by virtue of him being the Menteri Besar, was also Chairman of PKNS, and that the charge related to the official duties and functions of the appellant as Chairman of

PKNS at the material time. As Chairman of PKNS, the appellant was a public servant, by reason of ss 11, 12, 13, and 17 of the PKNS Enactment 1964 and s 21 of the Code, when read together with and in the context of s 165 of the Code.

[30] On what he perceived to be strong authorities to support the appellants' case, learned counsel submitted that all ingredients of the tort of misfeasance in public office had been disclosed against the respondent. He said there was no need to go too deeply into the semantics of what 'public officer', 'government officer' and 'public office' mean, and that considered from this perspective, this was not a fit and proper case for disposal under O 18 r 19 of the Rules. It was his contention that:

(a) the respondent is in public office;

(b) there was a deliberate and dishonest wrongful abuse of power by the respondent 'in his capacity in the public office';

(c) such deliberate and dishonest wrongful abuse of power was committed with bad intention (malice); and

(d) the appellants or a person in the appellants' class suffered or would in all likelihood suffer from such deliberate and dishonest wrongful abuse of power by the respondent.

[31] Note that counsel used the term 'public office' instead of 'public officer' to refer to the first ingredient of the tort, contrary to what the House of Lords had laid down in *Three Rivers*. Having himself said that the court should not go too deeply into the semantics of what 'public officer' 'government officer' and 'public office' mean, learned counsel then went full throttle ahead to literally 'dive' into the semantics in his submissions, in fact using, as the main plank of his argument, that the respondent is a 'public officer'.

[32] This is clear from the following paragraph of his written submissions where he pointedly said that the learned judge was wrong in his interpretation of the term 'public officer':

Now, at this juncture, the crux of the issue which led to the erroneous finding of the learned High Court judge is in respect of the interpretation of the terms 'public office' and 'public officer', wherein the learned High Court judge had erroneously applied the wrong principles of law in defining the terms 'public office' and 'public officer'. In this regards, the learned High Court judge had failed to consider that the Appellants' claim against the Respondent on both the causes of action are based on the principles in common law, and that, the terms of 'public office' and 'public officer' must be construed and understood in the context of common law principle, whilst the constitutional or statutory definition do not play any part in the ingredients of those two torts in common law.

[33] Learned counsel dedicated considerable space in his written submissions to argue on the 'semantics'. But when the wheat is separated from the chaff, the pith and substance of his argument was that since the appellants' cause of action was founded on common law and not on written law, the court must shut its eyes to the statutory provisions, including the provisions of the Federal Constitution ('the Constitution') that give meaning to the words 'public officer', 'public office', 'public services' and such other related words.

[34] What counsel was saying in effect was that where the cause of action is founded on common law, the statutory provisions, including the constitutional provisions are to be taken as dead letters of the law, to be buried without the proper burial rites in Parliament, that august House where statutes are born and pass on. That cannot be a correct position of the law. As Lord Denning MR said in *Smith and others v Inner London Education Authority* [1978] 1 All ER 411 at p 418:

> We must assume that Acts of Parliament will continue to govern our affairs unless and until they are in fact repealed.

[35] In particular, we were urged upon to ignore the meaning given to the words 'public officer' by the Interpretation Acts but to apply instead the common law meaning of the words as propounded by the House of Lords in *Three Rivers*. To recapitulate, the meaning given to the words 'public officer' by the House of Lords in that case was 'the office in a relatively wide sense on which everything depends' which we have said hardly defines the words.

[36] Learned counsel went on to submit that it is of fundamental importance to bear in mind that the common law tort of misfeasance in public office acts as an effective safeguard against any breach of the doctrine of separation of powers within the structure of the Constitution, citing the recent Federal Court decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat; Amitabha Guha (sebagai wasi bagi harta pusaka Madhabendra Mohan Guha) & Anor v Pentadbir Tanah Daerah Hulu Langat* [2017] MLJU 535 where Zainun Ali FCJ delivering the judgment of the court said:

> [88] The judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.
>
> [89] This is essentially the basis upon which rests the edifice of judicial power.
>
> [90] The concept above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the executive and the legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the executive and the legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in

ensuring that the powers of the executive and the legislature are to be kept within their intended limit (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135).

[37] It was submitted that if the tort of misfeasance in public office is 'taken out of the common law principles' (whatever counsel meant by that), it will paralyse the working and effectiveness of the doctrine of separation of powers and will give absolute immunity to the Prime Minister, the Deputy Prime Minister, Ministers and Deputy Ministers from legal action for their breaches of duty.

[38] There certainly is thunder and lightning in this catenation of legal propositions. We shall see if they bring rain. As we have mentioned twice, the House of Lords in *Three Rivers* had said, without explaining, that the phrase 'public officer' refers to 'the office in a relatively wide sense on which everything depends'. It was in this 'relatively wide sense' that officers of the Bank of England (the defendant in that case) were held to have satisfied the requirement of 'public officer'.

[39] The crucial question to ask in relation to the office of Prime Minister of Malaysia is whether it is permissible for the court to apply the common law meaning of 'public officer' when there is written law in force in Malaysia to define the meaning of the words and such other words. The written law in question is s 3 of the Interpretation Acts, which is a statute of general application. The section, inter alia, provides as follows:

'federal public office' means an office in the public service mentioned in Article 132(1)(c) of the Federal Constitution, that is to say, the general public service of the Federation;

'federal public officer' means a person lawfully holding, acting in or exercising the functions of a federal office;

'public office' means an office in any of the public services;

'public officer' means a person lawfully holding, acting in or exercising the functions of a public office;

'public services' means the public services mentioned in Article 132(1) of the Federal Constitution;

'Minister' means, subject to subsection 8(2), a Minister of the Government of Malaysia (including the Prime Minister and a Deputy Prime Minister);

'Police officer' means an officer of the Royal Malaysia Police;

'Prime Minister' means the Prime Minister of Malaysia;

'written law' means —

A (a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;

(b) Acts of Parliament and subsidiary legislation made thereunder;

(c) Ordinances and Enactments (including any federal or State law styling
B itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and

(d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made
C thereunder) which are in force in Malaysia or any part thereof;

[40] A federal 'public officer' therefore means a person who holds 'public office' in any of the general 'public services' of the Federation. Section 66 of the same Acts further provides:
D

'officer' and 'public officer' mean a person in the permanent or temporary employment of any Government in the Federation, and any person employed or deemed to be employed by the Railway Administration under the provisions of the Railway Ordinance 1948;

E 'Prime Minister' or 'Perdana Menteri' means the person appointed as Prime Minister by the Yang di-Pertuan Agong under Article 43 of the Constitution;

[41] As for the constitutional provisions relating to the public services,
F arts 132(1) and 132(3) of the Constitution provide as follows:

Article 132(1)

(1) For the purpose of this Constitution, the public services are —

(a) the armed forces;
G

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) the police force;

H (e) (Repealed);

(f) the joint public services mentioned in Article 133;

(g) the public service of each State; and

(h) the education service.

I Article 132(3)

(3) The public service shall not be taken to comprise —

(a) the office of any member of the administration in the Federation or a State; or

(b) the office of President, Speaker, Deputy President, Deputy Speaker or member of either House of Parliament or of the Legislative Assembly of a State; or

(c) the office of judge of the Federal Court, the Court of Appeal or a High Court; or

(d) the office of member of any Commission or Council established by this Constitution or any corresponding Commission or Council established by the Constitution of a State; or

(e) such diplomatic posts as the Yang di-Pertuan Agong may by order prescribe, being posts which but for the order would be posts in the general public service of the Federation.

[42] A member of the administration is given a different meaning by the Constitution. Article 160(2) defines it as follows:

> Interpretation
>
> (2) In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say —
>
> 'member of the administration' means, in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary or Political Secretary and, in relation to a State, a person holding a corresponding office in the State or holding office as member (other than an official member) of the Executive Council;

[43] As can be seen, by virtue of s 3 of the Interpretation Acts, which must be read harmoniously with arts 132(1), (3) and 160(2) of the Constitution, 'public officer' and 'Prime Minister' are two different entities. They are intended by Parliament to be different (Parliament does not legislate in vain). In fact, art 132(3) of the Constitution expressly provides that the 'public service' shall not be taken to comprise the office of any 'member of the administration', to which the respondent belongs.

[44] If that is not clear enough, then we should take a closer look at s 66 of the Interpretation Acts which provides that 'Prime Minister' or 'Perdana Menteri' means the person appointed as Prime Minister by the Yang di-Pertuan Agong under art 43 of the Constitution. Contrast this with a 'public officer', whose appointment is not by the Yang di-Pertuan Agong but by the Public Services Commission. Thus, the Prime Minister is not a public officer and a public officer is not a Prime Minister. The Prime Minister is a 'member of the administration' whereas a public officer is a member of the 'public services'. The distinction is plain and obvious.

[45] In *Brennan v Comcare* [1994] 122 ALR 615 at p 634, Gummow J drew

a distinction between a case that establishes a common law principle and thereby setting a precedent and a decision on the meaning and effect of particular words appearing in a particular statute. This is what he said:

> The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding the concepts to which expression was sought to be given. The distinction is usefully expressed in the following passage from Judge Posner's work *The Problems of Jurisprudence*, 1990, p 248:
>
> Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning of negligence if we put it in different words from those used by Learned Hand, or William Prosser, or some other authoritative expositor of the concept.
>
> Statutory law differs in that the statutory text is the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law in decision-making is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept.
>
> They have first to extract the concept from the statute that interpret the statute. (There is a sense in which common law judges 'interpret' the common law, but it is the sense in which 'interpretation' means 'understanding').

[46] It was also counsel's contention that the respondent is a 'public officer' not only by virtue of being Prime Minister and Finance Minister but also by virtue of being President of the United Malays National Organisation (UMNO) and Chairman of the Barisan Nasional (BN).

[47] With due respect to learned counsel, he does not seem to appreciate that the United Malays National Organisation (UMNO) and the Barisan Nasional (BN) are not even public or government bodies. They are political parties registered under the Societies Act 1966. If we were to give credence to counsel's argument, then the line separating 'public officer' and those who are not will be blurred beyond recognition. It can even be extended to the manager of a golf club.

[48] It is critically important to keep in mind that under the Interpretation Acts, there is only one meaning assigned to the words 'public office', and that is 'an office in any of the public services'. In the face of this meaning, it will be stretching the imagination to suggest that the Prime Minister of Malaysia is a

federal officer in the general public service of the Federation. He is certainly not, for example, a member of the Fire and Rescue Services (BOMBA) which falls under the general public service of the Federation (art 132(1)(c) of the Constitution).

[49] The upshot of all these is that by the legislative force of s 3(1) of the Civil Law Act, the common law meaning of 'public officer' as propounded by the House of Lords in *Three Rivers* must, as a matter of law, give way to the statutory meaning given to the words by section 3 of the Interpretation Acts, which is a provision that 'has been made or may hereafter be made by any written law' within the meaning of s 3(1) of the Civil Law Act.

[50] No facet of the common law of England can override our written law. It is as simple as that and it is not for the courts to question the policy considerations behind the statutory provisions. We must leave that to the wisdom of the Legislature. As Lord Macnagthen said in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at p 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it is at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

[51] On the Constitution, Raja Azlan Shah FJ (as his late Royal Highness then was) delivering the judgment of the Federal Court in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 once said:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.

[52] We must say that it was disingenuous to the point of being audacious of learned counsel to suggest that the common law of England, ie judge made foreign law should override not only the Interpretation Acts but also the Constitution, the supreme law of the land. It needs no reminder that we must

not sacrifice our written law on the altar of common law for the sake of political expediency. That will undermine the sanctity of our Parliament.

[53] No twisting of the tongue nor linguistic acrobatics can alter the fact that under the written law in force in Malaysia, the Prime Minister is not a 'public officer'. We must not fall into the trap of thinking that just because the respondent holds public office, he is, by default, a 'public officer'. For him to be a public officer, he must hold office in any of the public services, which he does not.

[54] Since the term 'public officer' has been given a special meaning by the Interpretation Acts, it must not be given its popular, dictionary or common law meaning assigned to it by a foreign court in a foreign jurisdiction, no matter how persuasive and no matter how compatible with common sense the common law meaning is.

[55] To reiterate, a statutory meaning has been given to the words 'public officer' by the Legislature. That is the meaning that we must apply and no others in determining whether the Prime Minister of Malaysia is a 'public officer' for the purposes of the tort of misfeasance in public office. It makes no difference that the appellants' cause of action was based on common law and not on written law, for the question to ask is not whether the common law tort of misfeasance in public office applies (*Three Rivers* has been confirmed as part of our law by the Federal Court in *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4 CLJ 676), but whether the first ingredient of the tort covers the office of Prime Minister.

[56] Having regard to the meaning given to the relevant words by the Interpretation Acts and the Constitution, specifically the words 'Prime Minister', 'public officer', 'public office', 'public services' and 'member of the administration', it is clear to us that there was no substance to counsel's contention that the Prime Minister is a 'public officer'.

[57] To accede to counsel's argument would be to downgrade the office of Prime Minister to the level of an ordinary government servant. That cannot be right. The long and short of the matter is that the respondent is a Prime Minister, not a public officer. In the final analysis, the appellants' contention that the Prime Minister is a 'public officer' is all thunder and lightning, minus the rain.

[58] As for the *Belize* case that learned counsel relied on so heavily, it must be appreciated that unlike Malaysia, the Carribean does not have any statute that defines the words 'Prime Minister', 'public officer', 'public office', 'public services' and 'member of the administration'. Nor does the Carribean

Constitution provide any definition for such terms.

[59] In the absence of any statutory definition for the words 'public officer', it is understandable why the majority in that case resorted to the *Three Rivers* meaning of the words to attach tortious liability to the two former Ministers who abused their power during their terms of office. It is in this context that the *Belize* case must be understood. It is in this respect that counsel was misguided in his reliance on the case.

[60] Our deliberation on this issue will not be complete if we do not direct our minds to s 2 of the Government Proceedings Act 1956 ('the GPA') which defines the word 'officer' as follows:

> 'officer' in relation to a Government, includes a person in the permanent or temporary employment of such Government and accordingly (but without prejudice to the generality of the foregoing) includes a Minister of such Government;

[61] It is tempting to argue that since an 'officer' includes a 'Minister of such Government' (which under s 3 of the Interpretation Acts includes the Prime Minister), the Prime Minister being a Minister of the Federal Government must therefore be treated as a 'public officer' for the purposes of the tort of misfeasance in public office. Our short answer to the argument is that the definition only comes into play if the government is made a party to the proceedings, which is not the case in the present appeal.

[62] The government is of course susceptible to a cause of action in tort. This is provided by s 5 of the GPA which reads:

> 5 Liability of the Government in tort
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

[63] Misfeasance in public office, being a form of tort, would therefore fall under the purview of this provision. There is a limit however to the government's liability for any tortious act done by a 'public officer'. This is provided by s 6(1) of the GPA which stipulates as follows:

> 6 Limits of liability of the Government

A (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

B **[64]** Thus, even if, for the sake of argument, the government had been made a party to the present suit, the action would not have taken off the ground in any event for the simple reason that such proceedings would not have lain against the respondent personally, thus taking it outside the ambit of s 5 of the GPA.

C **[65]** The reason for this is that in his personal capacity, the respondent (even assuming for a moment that he is a 'public officer') would not have the power the appellants alleged that he has in his official capacity as Prime Minister. For example, in his personal capacity, the respondent would not have the power to D dismiss the Deputy Prime Minister, the Minister of Rural and Regional Development and the attorney general from their posts. That is probably the reason why the appellants did not make the government a party to the suit.

[66] It was for all these reasons that we rejected the appellants' contention E that the learned High Court judge was wrong in holding that the Prime Minister is not a public officer for the purposes of the tort of misfeasance in public office.

[67] We shall now deal with the appellants' other cause of action, which is F 'breach of fiduciaries in public office'. The appellants' contention was that when the respondent took his oath of office as Prime Minister, he holds duty as a fiduciary to the Federation for the benefit of the citizens of Malaysia as a whole, of which the appellants are part, and upon which the courts have, to borrow counsel, 'a duty to check'. It was submitted that it is the duty of the G court as the 'supreme policing authority' to ensure that those in high public office hold true to their constitutional oaths.

[68] For this proposition, learned counsel referred us to the following H observations by Hamid Sultan Abu Backer JCA in *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] 3 AMR 35:

I The courts must take cognisance that the Federal Constitution stands as the 'Guaranteed Bond of Bill of Rights' to the Malaysian public and to the civilised world (which deals and trades with us), expressing how the constitutional functionaries namely the executive, legislature, and the judiciary inclusive of all state machineries such as the Police, Attorney General, Election Commission, etc will execute the 'Guaranteed Bond' as per oath of office to maintain the rule of law. In this context, the apex court headed by the Chief Justice of Malaysia is entrusted the 'Supreme Policing Authority' of the Federal Constitution and with the

assistance of his brother and sister judges pursuant to the sacrosanct duty of office is duty bound, to ensure the constitutional functionaries perform according to the oath of office and the state machinery and its agency subscribe to the rule of law in all their deeds and action and be always ready to be answerable to the court if there is a complaint by the public that his or her constitutional right has been infringed ...

[69] We were then referred once again to the *Belize* case but this time counsel's focus was on the following passages in the judgment of Justice Jacob Wit, who was in the majority:

[97] A public officer is supposed to use his powers for the common good of the people and not for his own selfish purposes. He is not allowed to use the office he holds or the powers he has to obtain any improper private advantage for himself. 'The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he might realise through the acquirement of an interest in conflict with his fidelity as an agent'. Indeed the relationship between the State and its public officers is comparable to that of principal and agent. The public officer is a fiduciary and has fiduciary duties.

[98] The fiduciary position of ministers in Belize is clearly reflected by their oath of office in Schedule 3 of the Constitution: 'I do swear that I will bear true faith and allegiance to Belize (meaning the Sovereign State of Belize), and will uphold the Constitution and the law, and that I will conscientiously, impartially and to the best of my ability discharge my duties ... and do right to all manner of people without fear or favour, affection or ill-will. So help me God.

[99] The duty to loyalty or allegiance is at the heart of any fiduciary relationship. 'Broadly speaking ... a fiduciary relationship is imposed by law in any case where the professional owes an exclusive loyalty to his principal's interests, and must put these above all others, including his own'. Equity proscribes the fiduciary not only from accepting bribes nut also from any unauthorized gain. Remedies for breach of fiduciary duty include compensation for any loss suffered (a so-called reparation claim) and disgorgement of gains wrongfully made. Equity goes even further than that: if the wrongfully obtained gains have been used to buy property the original claim for money can be converted into a propriety claim (tracing).

[70] Our first comment with regard to this judgment is that it was given in the context of a country that does not give statutory meaning to the words 'public officer'. We have said this in dealing with the appellants' cause of action in the tort of misfeasance in public office. Further, para [99] of the judgment speaks of 'exclusive loyalty to his principal's interest'.

[71] In the context of the issue before us, 'exclusive loyalty to his principal's interest' can only mean loyalty or allegiance owed by the Prime Minister to the King and country, not to the appellants as private citizens. We do not believe counsel was suggesting that the appellants are the respondent's 'principal'. For this reason alone, counsel's reliance on the *Belize* case is again misconceived.

A **[72]** To get a better grasp of counsel's line of argument on 'breach of fiduciaries in public office' as a cause of action, perhaps we should reproduce verbatim what he said in his written submissions. This is what he said:

> Therefore, based on the above two authorities, the Appellants submit that the answer to the question of whether as the Prime Minister of Malaysia, Chairman of BN and President of UMNO, the Respondent owes a fiduciary duty to the Plaintiffs and the Malaysians at large, should be in the affirmative. As to whether there is a valid cause of action on the ground of breach of fiduciaries in public office by the Respondent, the Appellants submit that this is an issue that requires careful and mature consideration of the facts and the law involved, and the proper forum should be at the full trial, and not at the striking out proceeding.

[73] It appears from the submission that the allegation of 'breach of fiduciaries in public office' is not confined to the respondent's capacity as Prime Minister but also extends to his capacities as President of UMNO and Chairman of Barisan Nasional. But this goes against the grain of counsel's argument that the respondent's fiduciaries arose from his oath of office as Prime Minister, not as President of UMNO or Chairman of Barisan Nasional. As we said earlier in this judgment, the last two are not even public offices to qualify the holders of the offices as 'public officers'.

[74] By its nature, the so-called tort of 'breach of fiduciaries in public office' requires proof that the defendant is a 'public officer', the same ingredient that is required to prove the tort of misfeasance in public office. Counsel for the appellants in fact candidly admitted in the course of argument before us that the 'tort' of breach of fiduciaries in public office is tied to the issue of 'public office' and 'public officer'. He was right of course because breach of fiduciaries in public office necessarily involves wrongdoing by a 'public officer'. So here again the appellants failed to clear the first hurdle that they had to clear, which was to establish that the respondent is a 'public officer'.

[75] It is unfortunate that learned counsel did not, and perhaps he could not, cite a single authority directly on point on this strange sounding (at least to us) tort of 'breach of fiduciaries in public office'. We were not even told of its origin and whether it is the common law of England. What is clear is that the appellants treated this cause of action as distinct and separate from their cause of action in the tort of misfeasance in public office. But despite that, they relied on the same set of facts to establish both causes of action.

[76] What is undeniable is that the two causes of action overlap. Even for the principle of law involved, counsel relied on the same authority, namely the *Belize* case, which he relied on in support of the appellants' cause of action in the tort of misfeasance in public office. But surely the ingredients of misfeasance in public office and breach of fiduciaries in public office are

different in at least one important respect, and that is, the latter requires proof of fiduciary duty whereas the former does not. It would appear that the appellants were utterly confused as to the ingredients of the so-called tort of breach of fiduciaries in public office. That explains why they fused together the two causes of action.

[77] Counsel referred to the Federal Court case of *Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Mohd Nor* [2016] 4 MLJ 282; [2016] 6 CLJ 346 to perhaps to implore upon us to accept 'breach of fiduciaries in public office' as part of our law. In that case, the Federal Court imported the tort of sexual harassment into our legal system. Suriyadi Halim Omar FCJ delivering the judgment of the court said at p 353:

> After mulling over the matter, we arrived at a decision to undertake some judicial activism exercise and decide that it is timely to import the tort of harassment into our legal and judicial system, with sexual harassment being part of it.

[78] A fiduciary duty means that the person who owes the duty is obligated to prefer the interests of the person to whom such duty is owed over his own interests. A clear example is that of a solicitor-client relationship, or a director-company relationship. In the *Oxford Dictionary of Law* (7th Ed) the word 'fiduciary' is given the following meaning:

> 'fiduciary': A person who holds a position of trust or confidence with respect to someone else and who is therefore obliged to act solely for that person's benefit.

[79] Going by this definition, a fiduciary relationship only exists where there is mutual trust and confidence between two parties and the person who holds the position of trust is obliged to act 'solely' for the other person's benefit. We do not see how this definition fits in with the appellants' contention that the respondent in his capacity as Prime Minister owes them a fiduciary duty. It appears to be a case of an oversized square peg in a tiny round hole.

[80] In *Richard Hugh Frame v Eleanor Margaret Smith and Johnson Smith* [1987] 2 SCR 99, the Canadian court was dealing with a family dispute where the non-custodial parent was deliberately denied access to children notwithstanding court orders specifying access. At p 102 the court laid down the following test to prove the existence of a fiduciary duty:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretionary power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[81] Even if this case, which does not involve the element of 'public office' in the first place were to be used as a guide, the appellants would still fail the test as there would be no fiduciary relationship existing between them and the respondent. We do not think it can seriously be suggested that the appellants were peculiarly vulnerable to or at the mercy of the respondent who is alleged to have unfettered authority over them. Thus, the third characteristic of a fiduciary relationship as laid down in *Richard Hugh Frame* will not be met by the appellants. A full trial will not serve any purpose to further their cause of action in 'breach of fiduciaries in public office'.

[82] In *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal* [2012] 4 MLJ 72; [2013] 2 CLJ 734 this court was dealing with the issue of fiduciary in the context of an action for taking account. Ramly Ali JCA (now FCJ) delivering the judgment of the court said at p 744:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular manner in circumstances which give rise to a relationship of trust and confidence. A fiduciary must act in good faith; he must not make profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. (See: *Bristol and West Building Society v Mothew; (t/a Stapley & Co)* [1996] 4 All ER 698, the English Court of Appeal).

[83] Here again, the emphasis is on the element of loyalty to the principal, not the other way around. Are the appellants saying that they owe a single-minded loyalty to the respondent as Prime Minister of Malaysia, as President of UMNO and as Chairman of Barisan Nasional? We think not.

[84] In *Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors* [2016] 10 MLJ 517; [2015] 8 CLJ 555 a fiduciary relationship in the context of solicitor-client relationship was defined by Rozana Ali Yusoff JC in the following terms:

> The term 'fiduciary' means trust, so in a fiduciary relationship the client places his or her confidence, good faith, reliance and trust in the solicitor, whose advise is sought on some matter.

[85] The common thread among these cases is that a fiduciary relationship only exists when there is mutual trust and confidence between two parties. We do not see how this element of mutual trust and confidence exists between the

respondent as Prime Minister and the appellants as private citizens.

[86] That disposes of the issue of fiduciaries but for the sake of completeness, we shall deal with the grounds given by the three appellants to support their allegations that the respondent in those mentioned capacities committed breach of fiduciaries in public office. The first appellant, Tun Dr Mahathir bin Mohamad relied on the following facts:

(a) as a veteran of UMNO, he had announced publicly that he withdrew his support for the respondent;

(b) he had participated in the Bersih Rally 4.0 and gave a press conference and took questions from the media, wherein he reiterated his criticism of how the respondent had dealt with the issue concerning 1MDB;

(c) he was questioned by the police on the defamatory statements he made during his attendance at the Bersih 4.0 rally;

(d) he also voiced out his criticism against the respondent in his web blog www.chedet.cc; and

(e) his termination as the Advisor of Petronas by a unanimous decision of the cabinet.

[87] As for the second appellant, the facts that he relied on are set out in his 17 paragraph statement of claim at p 92 of the record of appeal.

Essentially, his dissatisfaction was over the alleged denial by the respondent of the due process of law in the aftermath of his revelations on the 1MDB issue as well as the transfer of the RM2.6 billion and RM42m into the respondents' personal bank accounts.

[88] As for the third appellant, her grievance was over the termination of her membership in UMNO after she filed a derivative action on behalf of UMNO against the respondent in connection with the transfer of the RM2.6 billion into his personal accounts.

[89] We find it difficult to comprehend how the facts that the appellants relied on could constitute 'breach of fiduciaries in public office'. In the first place, it was not pleaded by any of them that they suffered damage as a result of the exercise of power by the respondent. The first appellant even included, as a ground for saying that the respondent had breached his fiduciaries in public office, his withdrawal of support for the respondent.

[90] It was not explained though how he suffered damage due to his withdrawal of support for the respondent. If at all, we would think that it is the

A respondent who will suffer damage as a result of such withdrawal of support by the first appellant, not the first appellant himself by any reckoning.

[91] The second appellant complained that a travel ban was imposed on him by the Director General of Immigration and that later he was arrested by the police and remanded soon after, then released and then re-arrested before being finally charged in court. Again, we fail to comprehend how these actions by the Immigration Director General and the police could constitute breach of fiduciaries in public office by the respondent.

[92] If at all any party is liable, the second appellant's cause of action lies in filing a suit against the Director General of Immigration, the Inspector General of Police or the Attorney General. Further, nowhere in any of the pleas in his statement of claim from paras 56–72 did the second appellant plead that the respondent did anything or omitted to do something that caused damage to him. There is nothing in any of the reliefs sought that the second appellant had a cause of action against the respondent. In short, there was nothing to go for trial for.

[93] As for the third appellant, she claimed that after her removal as a member of UMNO, she filed a suit against that decision and she lost. She claimed to have filed further proceedings against the respondent and again lost. What is clear from paras 73–76 of her statement of claim is that there was no plea that the respondent was liable for her defeat in all the three cases that she filed in court. It is clear that the third appellant had no cause of action whatsoever against the respondent. There is therefore nothing to go for trial for.

[94] In any case, the third appellant was no longer a member of UMNO by the time this appeal was heard. She was already a member of another political party. By this action, she had clearly evinced an intention to no longer be part of UMNO.

[95] A defect common to all three appellants in their pleadings is that there were no pleaded particulars of the specific acts taken by the respondent, the dates of such acts (or omissions) or the nature of the alleged instructions issued by the respondent, and to whom. There was absolutely no plea on these ingredients of the so-called tort of 'breach of fiduciaries in public office'.

[96] Accordingly, the pleadings as they stand could not possibly get off the ground. This cause of action, like their cause of action in misfeasance in public office, is doomed to fail. A trial will not rectify or remedy this defect.

[97] It was for the reasons that we set out in these grounds of judgment that

we dismissed the appellants' appeal with costs and affirmed the decision of the High Court.

Appeal dismissed with costs.

Reported by Ashok Kumar